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5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**
7

8 ROSITA FRAUSTO,

9 Petitioner,

10 v.

11 STATE OF CALIFORNIA,

12 Respondent.

Civil No. 07-2073 BEN (CAB)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

13 Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas
14 Corpus pursuant to 28 U.S.C. § 2254.

15 **FAILURE TO SATISFY FILING FEE REQUIREMENT**

16 Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma
17 pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee
18 or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice.
19 See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must
20 submit, **no later than January 2, 2008**, a copy of this Order with the \$5.00 fee or with adequate
21 proof of his inability to pay the fee.

22 **FAILURE TO NAME A PROPER RESPONDENT**

23 In addition, review of the also Petition reveals that Petitioner has failed to name a proper
24 respondent. On federal habeas, a state prisoner must name the state officer having custody of
25 her as the respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule
26 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition
27 fails to name a proper respondent. See id.

28 The warden is the typical respondent. However, “the rules following section 2254 do not

1 specify the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the
 2 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal
 3 institutions.’” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a
 4 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall
 5 be the state officer who has official custody of the petitioner (for example, the warden of the
 6 prison).’” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

7 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]
 8 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The
 9 actual person who is [the] custodian [of the petitioner] must be the respondent.” Ashley v.
 10 Washington, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of
 11 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the
 12 body” if directed to do so by the Court. “Both the warden of a California prison and the Director
 13 of Corrections for California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d
 14 at 895.

15 Here, Petitioner has incorrectly named “State of California,” as Respondent. In order for
 16 this Court to entertain the Petition filed in this action, Petitioner must name the warden in charge
 17 of the state correctional facility in which Petitioner is presently confined or the Director of the
 18 California Department of Corrections. Brittingham v. United States, 982 F.2d 378, 379 (9th Cir.
 19 1992) (per curiam).

20 **FAILURE TO ALLEGE EXHAUSTION OF STATE REMEDIES**

21 Further, habeas petitioners who wish to challenge either their state court conviction or the
 22 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.
 23 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial
 24 remedies, a California state prisoner must present the California Supreme Court with a fair
 25 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28
 26 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court
 27 remedies a petitioner must allege, in state court, how one or more of his or her federal rights
 28 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:

1 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal
 2 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the
 3 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas
 4 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the
 5 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only
 6 in federal court, but in state court.” Id. at 366 (emphasis added).

7 Nowhere on the Petition does Petitioner allege that he raised her claims in the California
 8 Supreme Court. In fact, she specifically indicates he did not seek review in the California
 9 Supreme Court. (See Pet. at 5.) If Petitioner has raised her claims in the California Supreme
 10 Court he must so specify. “The burden of proving that a claim has been exhausted lies with the
 11 petitioner.” Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v. Pruett, 134 F.3d
 12 615, 619 (4th Cir. 1998); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); Oyler v.
 13 Allenbrand, 23 F.3d 292, 300 (10th Cir. 1994); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).

14 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death
 15 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ
 16 of habeas corpus by a person in custody pursuant to the judgment of a State court. The
 17 limitation period shall run from the latest of:

18 (A) the date on which the judgment became final by the
 19 conclusion of direct review or the expiration of the time for seeking
 such review;

20 (B) the date on which the impediment to filing an application
 21 created by State action in violation of the Constitution or laws of the
 United States is removed, if the applicant was prevented from filing
 22 by such State action;

23 (C) the date on which the constitutional right asserted was
 initially recognized by the Supreme Court, if the right has been
 24 newly recognized by the Supreme Court and made retroactively
 applicable to cases on collateral review; or

25
 26 (D) the date on which the factual predicate of the claim or
 27 claims presented could have been discovered through the exercise
 of due diligence.

28 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

1 The statute of limitations does not run while a properly filed state habeas corpus petition
2 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).
3 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
4 when its delivery and acceptance [by the appropriate court officer for placement into the record]
5 are in compliance with the applicable laws and rules governing filings.”). However, absent some
6 other basis for tolling, the statute of limitations does run while a federal habeas petition is
7 pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

8 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
9 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to
10 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.
11 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal
12 habeas relief because he has not alleged exhaustion of state court remedies.

13 CONCLUSION

14 Based on the foregoing, the Petition is **DISMISSED** without prejudice and with leave to
15 amend for failure to satisfy the filing fee requirement, failure to name a proper respondent, and
16 failure to allege exhaustion of state judicial remedies. In order to have this case reopened,
17 Petitioner must, ***no later than January 2, 2008***, (1) pay the filing fee or provide adequate proof
18 of her inability to pay and (2) file a First Amended Petition that cures the deficiencies discussed
19 above. *The Clerk of Court shall send a blank Southern District of California In Forma Pauperis*
20 *Application and a blank First Amended Petition form to Petitioner along with a copy of this*
21 *Order.*

22 **IT IS SO ORDERED.**

23 DATED: November 2, 2007

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25 
26 Hon. Roger T. Benitez
27 United States District Judge
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